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No. 05-1382

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA,
INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Partial-Birth Abortion Ban Act of 2003 (the Act), Pub. L. No. 108-105, 117 Stat. 1201 (18 U.S.C. 1531 (Supp. III 2003)), prohibits a physician from knowingly performing a "partial-birth abortion" (as defined in the statute) in or affecting interstate commerce. § 3, 117 Stat. 1206-1207. The Act contains an exception for cases in which the abortion is necessary to preserve the life of the mother, but no corresponding exception for the health of the mother. Congress, however, made extensive factual findings, including a finding that "partial-birth abortion is never medically indicated to preserve the health of the mother." § 2(14)(O), 117 Stat. 1206. The question presented is as follows:

Whether, notwithstanding Congress's determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

PARTIES TO THE PROCEEDING

Petitioner is Alberto R. Gonzales, Attorney General of the United States. Respondents are Planned Parenthood Federation of America, Inc.; Planned Parenthood Golden Gate; and the City and County of San Francisco.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 435 F.3d 1163. The opinion and order of the district court (Pet. App. 55a-218a) are reported at 320 F. Supp. 2d 957.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2006. The petition for a writ of certiorari was filed on May 1, 2006, and was granted on June 19, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (18 U.S.C. 1531 (Supp. III 2003)), is set forth in an appendix to this brief.

STATEMENT

Like *Gonzales* v. *Carhart*, cert. granted, No. 05-380 (Feb. 21, 2006), this case concerns the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003. That Act prohibits a physician from knowingly performing a partial-birth abortion—a particular abortion procedure that Congress found to be "gruesome and inhumane" and to "blur[] the line between abortion and infanticide in the killing of a partially-born child just inches from birth." Act §§ 2(1), 2(14)(O), 117 Stat. 1201, 1206. Because Congress found, *inter alia*, that partial-birth abortion is "never medically indicated to preserve the health of the mother," § 2(14)(O), 117 Stat. 1206, it did not adopt a statutory exception for cases in which the abortion is necessary to preserve the mother's health. Like the court of appeals in *Carhart*, the court of appeals in this case held that, notwithstanding Congress's finding, the Act was facially invalid because it lacked a health exception. The court of appeals in this case, however, went further and also held that the Act was facially invalid on the grounds that it was unconstitutionally overbroad (because it reached certain other abortions besides partial-birth abortions) and unconstitutionally vague (because it could be read to reach other abortions). The court of appeals additionally held that it could not craft a narrower injunction, and therefore permanently enjoined enforcement of the Act in its entirety. Like the court of appeals' decision in *Carhart*, the court of appeals' decision in this case should be reversed.

1. The factual background to Congress's enactment of the Act is set forth at greater length in the government's brief in *Carhart* (at 2-4). The phrase "partial-birth abortion" refers to a late-term abortion procedure known as dilation and extraction (D&X) or intact dilation and evacuation (intact D&E). In that procedure, a physician partially delivers the fetus

intact and then intentionally kills it, typically by puncturing its skull and vacuuming out its brain. See, *e.g.*, J.A. 73, 282-283, 454-455, 480-481.

After years of hearings and debates, Congress passed, and the President signed, the Partial-Birth Abortion Ban Act of 2003. In *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), this Court had invalidated a Nebraska statute that banned "partial birth abortion" (as defined in that statute) unless the procedure was necessary to preserve the life of the mother. In drafting the Act, Congress deliberately sought to remedy the deficiencies identified by this Court in the statute at issue in *Stenberg*, and the Act differs from that statute in two principal ways.

First, based on "the testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses," Act § 2(14), 117 Stat. 1204, the Act contains detailed factual findings with respect to the medical necessity of partial-birth abortion. Congress found, *inter alia*, that "[p]artial-birth abortion poses serious risks to the health of a woman undergoing the procedure," § 2(14)(A), 117 Stat. 1204; that "[t]here is no credible evidence that partial-birth abortions are safe or are safer than other abortion procedures," § 2(14)(B), 117 Stat. 1204; and that "[t]he physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome," § 2(14)(E), 117 Stat. 1204-1205. Based on those and other findings, Congress ultimately found that "partial-birth abortion is never medically indicated to preserve the health of the mother," § 2(14)(O), 117 Stat. 1206. In the Act's operative provisions, therefore, Congress did not include an express statutory exception for cases in which the abortion is necessary to preserve the mother's health. § 3, 117 Stat. 1206 (18 U.S.C. 1531(a) (Supp. III 2003)).

Second, the Act contains the following, more specific definition of "partial-birth abortion":

> an abortion in which the person performing the abortion—(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

Act § 3, 117 Stat. 1206-1207 (18 U.S.C. 1531(b)(1) (Supp. III 2003)). That definition is tailored to exclude the more common standard D&E procedure, in which the physician dismembers the fetus while the remainder of the fetus is still in the womb. The Act imposes criminal and civil sanctions only on a physician who knowingly performs a partial-birth abortion. § 3, 117 Stat. 1206 (18 U.S.C. 1531(a) (Supp. III 2003)).

2. Respondents Planned Parenthood Federation of America, Inc., and Planned Parenthood Golden Gate brought suit against the Attorney General, seeking a permanent injunction against enforcement of the Act. Respondent City and County of San Francisco subsequently intervened as a plaintiff. Respondents asserted that the Act was facially invalid under the Fifth Amendment on the grounds that, *inter alia*, (1) it imposed an undue burden on a woman's access to an abortion because it lacked an express statutory health exception; (2) it imposed an undue burden because it prohibited not only D&X abortions, but also certain other abortions; and (3) it was unconstitutionally vague in various respects.

After a bench trial, the district court granted judgment to respondents and entered a permanent injunction barring the

government from enforcing the Act against respondents and their employees. Pet. App. 55a-218a. The district court agreed with respondents that the Act was facially invalid on all three grounds.

The district court first held that the Act was facially invalid because it lacked a health exception. Pet. App. 96a-217a. After reviewing the evidence presented at trial, the district court found that "plaintiffs have not demonstrated the existence of any particular situation * * * in which an intact D&E would be a doctor's *only* option to preserve the life or health of a woman." *Id.* at 147a (emphasis added). Nevertheless, the court also found that "intact D&E is in fact the safest medical option for some women in some circumstances." *Ibid.* The court rejected the government's argument that Congress's factual findings—including its ultimate finding that partial-birth abortion was never medically indicated to preserve the health of the mother—were entitled to deference. *Id.* at 156a-213a.

The district court further held that the Act was facially invalid because it was unconstitutionally overbroad and therefore would impose an undue burden. Pet. App. 73a-89a. The court explained that "[p]hysicians may perform each element contained in the Act's definition [of 'partial-birth abortion'] in any D&E procedure, and in the course of certain induction abortions and treatment of spontaneous miscarriages as well." *Id.* at 85a. The court thus concluded that the Act's definition "encompasses several second trimester abortion procedures *in addition* to intact D&E." *Ibid.* The court added that, "even assuming that the Act covers only the intact D&E procedure, the Act does not distinguish between previability and postviability." *Id.* at 88a. "To the extent that a woman seeks or requires an intact D&E abortion prior to viability," the court reasoned, "this Act would undoubtedly place a substantial obstacle in her path and decision." *Id.* at 88a-89a.

Finally, the district court held that the Act was facially invalid because it was unconstitutionally vague. Pet. App. 89a-96a. The court stated that "the Act fails to clearly define the prohibited procedures and does not use terminology that is recognized in the medical community." *Id.* at 89a. The court explained that "the term 'partial-birth abortion' has little if any medical significance in and of itself," *id.* at 92a; "the term 'living fetus' adds to the vagueness of the statute, since, the term 'living fetus' * * * does not pertain to viability," *id.* at 93a; and "the requirement of an 'overt act' [does not] sufficiently narrow the scope of the Act to give notice of the type of abortion procedure prohibited," *ibid.* The court also stated that "the Act's vagueness and unconstitutional breadth cannot be cured by the alleged scienter requirements." *Id.* at 94a.

3. The court of appeals affirmed. Pet. App. 1a-54a.

a. As to the lack of a health exception, the court of appeals construed this Court's decision in *Stenberg* as holding that "an abortion regulation that fails to contain a health exception is unconstitutional except when there is a medical consensus that no circumstance exists in which the procedure would be necessary to preserve a woman's health." Pet. App. 15a. The court of appeals acknowledged that Congress had made various factual findings concerning the necessity of a health exception, but declined to defer to those findings. *Id.* at 17a. "Under even the most deferential standard of review," the court rejected Congress's threshold finding that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion * * * is never medically necessary," Act § 2(1), 117 Stat. 1201. Pet. App. 19a. The court explained that "evidence of the lack of medical consensus is replete throughout th[e] [legislative] record." *Ibid.* The court likewise rejected, as inconsistent with *Stenberg*, the government's submission that the court should in any event

defer to Congress's ultimate (and dispositive) finding that "partial-birth abortion is never medically indicated to preserve the health of the mother," Act § 2(14)(O), 117 Stat. 1206. Pet. App. 21a-22a.

As to overbreadth, the court of appeals reasoned that, in *Stenberg*, this Court "provided legislatures with guidance about how to draft statutes that would adequately distinguish between" D&X and standard D&E abortions. Pet. App. 24a. In the court of appeals' view, this Court "explained that a legislature can make clear that a statute * * * applies to [D&X abortions]" either by using language that tracks the medical differences between the two types of abortion or by providing an express exception for standard D&E abortions. *Ibid.* The court of appeals concluded that "Congress deliberately chose not to follow the Court's guidance" in drafting the Act. *Id.* at 25a. Instead, the court of appeals asserted, "Congress defined the prohibited procedure in a way that * * * includes both intact and non-intact D&Es." *Ibid.*

The court of appeals rejected the government's contention that the Act differed from the Nebraska statute at issue in *Stenberg* because it contained a narrower and more specific definition of the prohibited procedure. Pet. App. 26a-27a. The court reasoned that, "in non-intact D&Es, a doctor may extract a substantial portion of the fetus—including either a part of the fetal trunk past the navel or the entire fetal head—to the point where it is outside the body of the mother before the fetal disarticulation occurs." *Id.* at 27a. The court further reasoned that such subsequent "disarticulation" (*i.e.*, dismemberment) could constitute an "overt act" that kills the living fetus. *Id.* at 30a. Because "the Act covers non-intact as well as intact D&Es," the court concluded, it imposed an undue burden on a woman's access to an abortion. *Ibid.*

As to vagueness, the court of appeals stated that "the language of the statute, taken as a whole, is not sufficiently clear

regarding what it permits and prohibits to guide the conduct of those affected by its terms." Pet. App. 34a. The court reasoned that the Act's operative provisions were vague because the Act "could readily be applied to a range of methods of performing post-first trimester abortions." *Id.* at 37a. The court then contended that the particular phrase "overt act" was also vague because it could "plausibly encompass a range of acts involved in non-intact D&E [abortions]," and that the phrase "does nothing to remedy the statute's failure to provide adequate notice of what forms of D&E the Act prohibits." *Id.* at 38a. Similarly, the court asserted that the phrase "living fetus" "adds to confusion about the scope of the prohibited conduct." *Id.* at 39a. Finally, the court concluded that any vagueness could not be cured by the Act's scienter requirements. *Ibid.*

b. The court of appeals further held, despite this Court's guidance in *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), that the Act should be enjoined in its entirety. Pet. App. 40a-54a. The court of appeals initially suggested that, if the Act were facially invalid solely because it lacked a health exception, the court "might have been able to draft a more 'finely drawn' injunction." *Id.* at 41a (citation omitted). The court reasoned, however, that a narrower injunction would not be appropriate even in that instance, because such an injunction would be inconsistent with Congress's intent in promulgating the Act. *Ibid.* In the court's view, the Act's sponsors believed that the Act would have little force or effect if it contained a health exception. *Ibid.* Moreover, the court hypothesized that, "[p]articularly when an issue involving moral or religious values is at stake, it is far from true that the legislative body would always prefer some of a statute to none at all." *Id.* at 46a.

Ultimately, however, the court of appeals concluded that "we need not rest our decision as to the appropriate remedy

solely on the omission of a health exception" because the Act was also unconstitutional on other grounds. Pet. App. 47a. To remedy all of the asserted constitutional deficiencies, the court contended, it "would in effect have to strike the principal substantive provision that is now in the Act and then, akin to writing legislation, adopt new terms with new definitions and new language creating limitations on the Act's scope." *Ibid.* Such a remedy, the court reasoned, "would result in a statute that would be fundamentally different from the one enacted." *Ibid.* The court therefore concluded that the only appropriate remedy was to enjoin enforcement of the Act in its entirety. *Id.* at 54a.

SUMMARY OF ARGUMENT

The court of appeals erred in invalidating the Partial-Birth Abortion Ban Act of 2003. That Act is constitutional under this Court's precedents because it advances vital state interests in protecting human life and preventing a rarely used and gruesome late-term abortion procedure that resembles infanticide. At the same time, the Act does not deny any woman the ability to obtain a safe abortion using a more common abortion method, and thus imposes no undue burden on a woman's ability to obtain an abortion.

I. The absence of a health exception in the Act's ban on a particular abortion procedure does not amount to an undue burden. Under this Court's precedents, the relevant inquiry is whether a statute regulating an abortion procedure creates significant health risks, such that it places a substantial obstacle in the path of a woman seeking an abortion, in a large fraction of its applications. The court of appeals erred by reading *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), as holding that the relevant inquiry is instead whether there is a *medical consensus* that *no circumstance exists* in which the procedure would be necessary to preserve a woman's health. Such a reading

would delegate authority over constitutional decisionmaking to a minority of medical professionals and put *Stenberg* into conflict with this Court's earlier decisions, including *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), which require a plaintiff to do more than merely demonstrate the existence of conflicting opinions about health risks in order to invalidate a statute. It would also create a conflict with this Court's decisions on the appropriate standard for facial challenges, which require a plaintiff to do more than merely demonstrate that a statute would be susceptible to unconstitutional application in *some* hypothetical situation. There is no reason for this Court to construe *Stenberg* in a manner that would *sub silentio* override its prior precedents.

Viewed in the proper light, the Act readily passes muster. In the Act, Congress made numerous factual findings concerning the medical necessity of partial-birth abortion, culminating in the ultimate finding that partial-birth abortion is *never* medically indicated to preserve the health of the mother. Those findings are supported by substantial evidence and are entitled to deference under long-standing principles. The court of appeals erred by failing to defer to Congress's ultimate and most relevant finding that partial-birth abortion is never medically necessary. Because that finding was supported both by the evidence before Congress and the testimony at trial in this case, it is entitled to deference.

Even apart from the deference owed to Congress, the evidence presented by respondents at trial at most suggests that partial-birth abortion may be *marginally* safer than more common abortion procedures in some hypothetical circumstances. Given the vital state interests in proscribing partial-birth abortion—a procedure that Congress found to be inhumane, bordering on infanticide, and subject to the most severe moral condemnation—such an attenuated interest does not give rise to an undue burden on a woman's access to an

abortion. That is particularly true since the statute denies no woman the ability to obtain a safe abortion through a more common abortion method. The court of appeals' contrary conclusion betrays a central premise of the joint opinion in *Casey*—namely, that the government retains a meaningful constitutional role in regulating abortion in order to protect human life and serve other important interests.

This Court's decision in *Stenberg* does not compel a different result. This case is distinguishable from *Stenberg* in several significant respects, and, as explained, under a proper reading of *Stenberg*, respondents' facial challenge to the constitutionality of the Act fails. To the extent that the Court concludes that *Stenberg* compels the conclusion that the Act is facially invalid, however, *Stenberg* should be overruled.

II. The Act readily passes muster under overbreadth and vagueness principles as well. Unlike the statute at issue in *Stenberg*, the Act does not reach standard D&E abortions, but instead is limited to abortions in which the physician delivers the fetus beyond a specified anatomical "landmark" and then performs a discrete "overt act" that kills the living fetus (and delivers the fetus with the purpose of performing that act). The Act therefore covers only abortions that constitute "partial-birth abortions" under any reasonable understanding of that concept. Nor is the Act void for vagueness, because it provides ample notice of the conduct that it prohibits and contains no ambiguous terms or phrases. In any event, because this case (unlike *Stenberg*) involves an Act of Congress, the solution to any overbreadth or vagueness problem that this Court believed to be lurking in the statute would be to adopt a narrowing construction of the Act, not to invalidate the Act on its face. The court of appeals erred in straining to find ambiguity, rather than construing the statute to avoid any infirmity.

III. Because the Act suffers from no constitutional defect, the Court need not fashion any remedy. If the Court nevertheless concludes that the Act is unconstitutional in any respect, however, it would be possible to craft narrower injunctive relief under *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), depending on the exact nature of the Act's infirmity. Assuming that it were necessary to do so, a court could readily draft an injunction that would prevent the Act from being applied in any hypothetical situation in which a partial-birth abortion is medically required, or to any abortions other than partial-birth abortions. There is good reason to believe that Congress would have preferred a prohibition on partial-birth abortion which is judicially modified in that manner to no prohibition at all. In any event, because the statute is in fact facially constitutional, no remedial question arises in this case, and the judgment below should be reversed in its entirety.

ARGUMENT

THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003 IS CONSTITUTIONAL ON ITS FACE

While the reasoning of the court of appeals here differs in some respects from that of the court of appeals in *Gonzales* v. *Carhart*, cert. granted, No. 05-380 (Feb. 21, 2006), it is equally flawed. In *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), this Court held that a Nebraska statute banning "partial birth abortion" (as defined in that statute) was invalid for two independent reasons. First, the Court held that the statute was facially invalid because it lacked an exception for cases implicating the health of the mother. *Id.* at 930-938. Second, the Court held that the statute was invalid because it defined "partial birth abortion" in such a way as to reach not only D&X abortions, but also standard D&E abortions. *Id.* at 938-946.

The court of appeals in this case held that the federal Act was invalid on both of those grounds, and also because it contained language that it viewed as unconstitutionally vague. The court of appeals, however, consistently downplayed, or simply disregarded, the various respects in which the federal Act differs from the statute that was at issue in *Stenberg*. Most notably, the Act is accompanied by extensive congressional factual findings, to which deference is owed, on the medical necessity of partial-birth abortion; contains a more precise definition of the procedure it prohibits; and, as a federal statute, should be construed to ameliorate, rather than exacerbate, any constitutional difficulties. As in *Carhart*, those differences compel the conclusion that the Act is constitutional on its face.

I. THE ABSENCE OF A HEALTH EXCEPTION DOES NOT RENDER THE ACT FACIALLY INVALID

The court of appeals first held that the Partial-Birth Abortion Ban Act of 2003 was facially invalid because it lacked a health exception. That holding was based on the fallacious premise that a statute regulating an abortion procedure must contain a health exception unless there is a *medical consensus* that *no circumstance exists* in which the procedure would be necessary to preserve a woman's health. This Court's decisions, however, hold that such a statute is facially invalid only where, in a large fraction of its applications, it creates significant health risks, such that it imposes an undue burden by placing a substantial obstacle in the path of a woman seeking an abortion. In passing the Act, Congress found that the partial-birth abortion procedure at issue is *never* medically indicated to preserve the health of the mother. That finding is entitled to deference and is supported by substantial evidence, including evidence in the trial record in this case (as in *Carhart*). Moreover, even if partial-birth abortion had mar-

ginal health benefits in some cases, that still would not be sufficient to overcome Congress's compelling interests in protecting potential human life, drawing a bright line between abortion and infanticide, and prohibiting a rarely used, late-term abortion procedure that is inhumane.

A. A Statute That Regulates Abortion, But Lacks A Health Exception, Is Not Facially Invalid Unless It Would Create Significant Health Risks, And Thereby Impose An Undue Burden, In A Large Fraction Of Its Applications

1. The government's brief in *Carhart* explains (at 14-16) that, applying its earlier decisions in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), this Court held in *Stenberg* that a statute prohibiting a particular abortion procedure without an express health exception would be unconstitutional if the statute would create "significant health risks"—*i.e.*, health risks significant enough to constitute an undue burden. 530 U.S. at 932; see *id.* at 931 (noting that "a State cannot subject women's health to significant risks"); *id.* at 938 (concluding that the statute at issue "creates a significant health risk"). The Court recognized that a statute prohibiting a particular abortion procedure would create significant health risks where the prohibited procedure is substantially safer than other procedures, either more generally or in specific circumstances (*e.g.*, where the mother has a particular health-threatening condition). *Id.* at 931. Applying that standard, the Court, pointing to the district court's findings and evidence, concluded that the plaintiff had demonstrated that the statute at issue would create significant health risks. *Id.* at 932; see *id.* at 934 (observing that the district court had found that "the D&X method was significantly *safer* in certain circumstances"); *id.* at 936 (noting the "District Court finding that D&X significantly obviates health risks in certain circum-

stances"). On that basis, the Court held the statute unconstitutional because it lacked a health exception. *Id.* at 938.

2. In this case, the court of appeals construed *Stenberg* as holding that "an abortion regulation that fails to contain a health exception is unconstitutional except when there is a *medical consensus* that *no circumstance exists* in which the procedure would be necessary to preserve a woman's health." Pet. App. 15a (emphases added). That analysis would give a handful of physicians veto power over the judgment of Congress (and a majority of the States) that partial-birth abortion should be proscribed, and is fundamentally mistaken.

a. In *Stenberg*, the Court did not hold that it would be sufficient for a plaintiff merely to point to the existence of conflicting evidence as to whether the statute at issue would create significant health risks. As the government's brief in *Carhart* demonstrates (at 16-18), although some language in the Court's opinion in *Stenberg* could be read, in isolation, to support that proposition, the Court ultimately made clear that it was not suggesting that "a State is prohibited from proscribing an abortion procedure whenever a particular physician deems the procedure preferable." 530 U.S. at 938. Moreover, such a reading of *Stenberg* would effectively put that decision into conflict with the Court's earlier decision in *Casey*, which in no way indicated that the relevant constitutional inquiry was whether there was any division of medical opinion on the existence of health risks. See 505 U.S. at 880.

The court of appeals in this case went even further than the court of appeals in *Carhart* by suggesting that a plaintiff need merely show the *absence of a consensus* that the statute at issue *would not* present significant health risks (rather than at least requiring the plaintiff to identify *substantial authority* for the proposition that the statute *would* in fact present significant health risks). Although the court of appeals in this case did state at one point that, "[b]y medical

consensus, we do not mean unanimity or that no single doctor disagrees," Pet. App. 15a, it nonetheless implied that a plaintiff could meet this requirement even where the overwhelming weight of authority showed that prohibiting a procedure would not present significant health risks. Nothing in this Court's opinion in *Stenberg* indicates that a small minority of physicians can effectively dictate the constitutionality of an abortion statute. The relevant constitutional inquiry cannot turn on the existence (or absence) of a "consensus."[1]

b. The court of appeals' interpretation of *Stenberg* is mistaken in another respect. The court of appeals construed *Stenberg* as holding that the relevant constitutional inquiry is whether "there is a medical consensus that *no circumstance exists*" in which the statute at issue would present significant health risks. Pet. App. 15a (emphasis added). In so reading *Stenberg*, the court of appeals injected an erroneous conception of facial challenges into its view of the relevant substantive test. Generally, a plaintiff mounting a facial challenge to a statute must show that there is no set of circumstances in which the statute can constitutionally be applied. See, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). While the joint opinion in *Casey* appears to have relaxed the facial-challenge standard at least in the context of spousal-notification provisions, see U.S. Br. at 16-18, *Ayotte* v. *Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006) (No. 04-1144), the court of appeals here appears to have suggested that a plaintiff need identify only *one* circumstance in which there is no consensus concerning the health benefits of the restricted

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[1] The court of appeals' opinion could even be read to require the *government* to prove the *existence* of a consensus that the statute would not present significant health risks, rather than requiring the *plaintiff* to prove the *absence* of such a consensus. So read, the court of appeals' opinion would reverse the general rule that the plaintiff bears the burden of proof in a facial challenge. See, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

procedure. Pet. App. 13a; see *id.* at 22a n.14. That misstates both the facial-challenge standard and the substantive standard. *Ayotte* makes clear that, whatever the appropriate standard for facial challenges, a statute should not be enjoined in all of its applications simply because it lacks an adequate health exception in some circumstances. See 126 S. Ct. at 969. Moreover, under the joint opinion in *Casey*, it is clear that the appropriate standard for judging the constitutionality of abortion statutes is whether the statute imposes an "undue burden" on a woman's access to an abortion.

The practical effect of the court of appeals' erroneous standard is that, at least with regard to a claim that an abortion statute would create impermissible health risks, there is no meaningful distinction between as-applied and facial challenges. Under the court of appeals' test, a plaintiff with no ability to demonstrate that the statute at issue would present significant risks to *her* health (and thus impose an "undue burden" on *her* access to an abortion) could nevertheless prevail on her as-applied challenge (and, indeed, obtain wholesale facial invalidation of the statute) as long as she could demonstrate that *some hypothetical circumstance* exists in which the statute would present significant risks to another woman. Nothing in *Stenberg* suggests that the Court intended to create such a radical exception to the ordinary rule that, in order to prevail on an as-applied challenge, the plaintiff must show that she would suffer injury from the statute being challenged. To the contrary, this Court has repeatedly upheld applications of abortion regulations to particular plaintiffs while still recognizing the potential for other, unconstitutional applications. See, *e.g.*, *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990); *Simopoulos* v. *Virginia*, 462 U.S. 506, 510 (1983); *H.L.* v. *Matheson*, 450 U.S. 398, 405-407 (1981); *Connecticut* v. *Menillo*, 423 U.S. 9, 11 (1975) (per curiam).

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To the extent that the court of appeals suggested that it would be sufficient to show that the statute would create significant health risks for even a single woman, such a rule would create a virtual presumption of facial invalidity and would eliminate in the abortion context any vestige of the traditional rules of standing (insofar as a plaintiff could effectively bring a facial challenge on behalf of another woman). Instead, the correct reading of *Stenberg* is that a statute that regulates a particular abortion procedure but lacks a health exception is not facially invalid unless, at a minimum, the statute would create significant health risks in a large fraction of its applications.[2]

B. When Analyzed Under The Proper Standard, The Record Overwhelmingly Supports Congress's Judgment That No Health Exception Was Required

In enacting the Partial-Birth Abortion Ban Act of 2003, Congress made numerous findings concerning the medical necessity of partial-birth abortion. The court of appeals in this case assumed, without deciding, that Congress's factual findings were entitled to deference, but concluded that Congress's threshold finding that a medical consensus exists that partial-birth abortion is never medically necessary was not supported by substantial evidence. That was error. Congress's factual findings were in fact entitled to deference, and substantial evidence supported Congress's ultimate and most relevant finding that partial-birth abortion is *never* medically indicated to preserve the health of the mother. The absence of a health exception therefore does not render the Act unconstitutional on its face.

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[2] Because the Act is clearly constitutional under the "large fraction" test, neither the instant case nor *Carhart* provides an appropriate vehicle to resolve whether the "no set of circumstances" standard from *Salerno* or the "large fraction" standard from *Casey* applies in this context. See 05-380 Br. 18-20.

1. Congressional Findings On Constitutionally Relevant Factual Issues Are Entitled To Great Deference

As the government's brief in *Carhart* explains (at 21-23), this Court has consistently held that courts should afford a high degree of deference to congressional factual findings that inform the constitutionality of federal statutes. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) (*Turner II*). The Court has deferred to congressional findings in a wide variety of contexts—including findings in cases involving fundamental constitutional rights and heightened levels of scrutiny, see, *e.g.*, *id.* at 185, 189-190, and findings on complex medical or scientific issues, see, *e.g.*, *Jones* v. *United States*, 463 U.S. 354, 363-366 & n.13 (1983); *Lambert* v. *Yellowley*, 272 U.S. 581, 588-597 (1926); see also *Stenberg*, 530 U.S. at 964-972 (Kennedy, J., dissenting) (discussing cases); cf. *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997) (noting that "it is precisely where * * * disagreement [among medical experts] exists that legislatures have been afforded the widest latitude in drafting * * * statutes").

Although the court of appeals recognized that, "[i]n some cases, the Court has expressly applied the substantial evidence standard described in *Turner* and related decisions," the court contended that, "[i]n others, the Court * * * has reviewed congressional findings of fact with considerably less deference." Pet. App. 18a. The two cases cited by the court of appeals for the latter proposition, however, do not support it. In both of those cases, this Court did not hold that the congressional findings at issue were subject to a lesser degree of deference, but instead held that those findings (even if valid) were simply insufficient, as a matter of law, to sustain a statute's constitutionality. See *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 (2001) (noting, in holding that Congress did not validly abrogate the States'

Eleventh Amendment immunity in Title I of the Americans with Disabilities Act (ADA), that "[t]he legislative record of the ADA * * * simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled"); *United States* v. *Morrison*, 529 U.S. 598, 614 (2000) (noting, in holding that Congress lacked authority to enact the Violence Against Women Act under the Commerce Clause, that Congress's findings concerning the impact of sexually motivated violence failed to demonstrate a sufficient effect on interstate commerce).

The court of appeals therefore erred to the extent that it suggested that "no single standard exists" for deferring to congressional findings that bear on the constitutionality of statutes. Pet. App. 19a. There is a single standard. That standard is the one set out in *Turner II*, and the court of appeals erred in failing to defer to the relevant congressional findings.

2. *Congress's Findings On The Medical Necessity Of Partial-Birth Abortion Are Entitled To Deference*

In *Carhart*, the court of appeals concluded that "the government's argument regarding * * * deference [to congressional findings] is irrelevant to the case at hand," 05-380 Pet. App. 15a, on the ground that *Stenberg* somehow foreclosed Congress from making factual findings on the medical necessity of partial-birth abortion, see *id.* at 16a-20a. In this case, by contrast, the court of appeals concluded that Congress's findings on the medical necessity of partial-birth abortion were entitled to at least some respect—and thereby implicitly acknowledged that *Stenberg* did not foreclose Congress from making its own findings on that issue. See, *e.g.*, Pet. App. 16a (stating that, "[u]nder the constitutional rule established in *Stenberg* * * *, we must inquire whether—applying the appropriate degree of deference to the legislative body's find-

ings—the legislature properly concluded that there is *consensus in the medical community* that the banned procedure is never medically necessary to preserve the health of women").

For the reasons stated in the government's brief in *Carhart* (at 26-30), the court of appeals was correct to recognize that deference was owed to congressional findings relevant to the legal test identified in *Stenberg*. The problem with the court of appeals' analysis is that it misidentified both the legal test applied in *Stenberg* and the relevant congressional finding. The correct test and critical finding focus not on the presence (or absence) of medical consensus, but rather on the necessity (or lack thereof) of the restricted procedure for the health of the mother.

3. *Congress's Findings On The Medical Necessity Of Partial-Birth Abortion Are Supported By Substantial Evidence*

Based on its misreading of *Stenberg*, the court of appeals in this case simply asked the wrong question: namely, whether substantial evidence supported the proposition that there is a *medical consensus* that no circumstance exists in which the procedure would be necessary to preserve a woman's health. Pet. App. 15a. The relevant question under *Stenberg* is instead whether substantial evidence supported Congress's ultimate finding that "partial-birth abortion is never medically indicated to preserve the health of the mother." Act § 2(14)(O), 117 Stat. 1206. Because substantial evidence plainly supported that finding, it is entitled to deference.

a. In engaging in "substantial evidence" review, a reviewing court should not "reweigh the evidence *de novo*, or * * * replace Congress' factual predictions with [its] own." *Turner II*, 520 U.S. at 211 (citation omitted). Instead, a reviewing court is required to defer to a congressional finding even if

the "evidence is in conflict." *Ibid.*; see *id.* at 208, 210. Although a reviewing court may consider not only the evidence that was before Congress, but also any evidence adduced at trial, in engaging in "substantial evidence" review, *id.* at 195, 212, the critical inquiry is whether there is sufficient evidence to suggest that *Congress's* determination was reasonable—not whether the reviewing court would reach the same determination as Congress on the basis of the record that Congress had before it (as supplemented by any evidence adduced at trial). See, *e.g.*, *id.* at 210-211; *Rostker* v. *Goldberg*, 453 U.S. 57, 82-83 (1981).

b. Substantial evidence supported Congress's ultimate finding that partial-birth abortion is never necessary to preserve the mother's health.

i. As the government's brief in *Carhart* sets out in greater detail (at 31-35), the record that Congress had before it strongly supported Congress's findings concerning the medical necessity of partial-birth abortion. Most of the physicians who appeared before Congress testified in favor of the Act. Those physicians testified that there were no circumstances in which a partial-birth abortion was the only appropriate type of abortion; that partial-birth abortion offers no safety advantages over other types of abortion; and that partial-birth abortion itself presents various safety risks that other abortion procedures do not. In addition to the testimony of those physicians, other evidence in the legislative record—including statements from leading physician groups, articles in medical journals, and written statements from other physicians—supported Congress's findings. Indeed, in making its findings, Congress expressly credited the conclusion of the American Medical Association (AMA) that partial-birth abortion is "never the only appropriate [abortion] procedure." Act § 2(14)(C), 117 Stat. 1204 (citation omitted).

ii. At trial in this case, as in *Carhart*, still other physicians testified that partial-birth abortion was never medically necessary, thereby confirming the reasonableness of Congress's findings.[3] To summarize, Dr. Watson Bowes, a professor emeritus of obstetrics and gynecology at the University of North Carolina specializing in maternal-fetal medicine, testified that medical studies had failed to show that partial-birth abortion offered any safety advantages over other types of abortion. J.A. 545-553, 564-568.

Dr. Steven Clark, a professor of obstetrics and gynecology at the University of Utah and ACOG fellow specializing in maternal-fetal medicine, testified that, in his experience, he had "never encountered a situation where either medical induction or D&E didn't work." He further testified that there is no "basis for using D&X," because D&E is a "well-studied alternative" that is "incredibly safe" and "incredibly effective." J.A. 864-865, 877, 890-892, 895-896.[4]

Dr. Curtis Cook, an assistant professor of medicine at Michigan State University and ACOG fellow specializing in maternal-fetal medicine, testified that he "[did not] believe that [partial-birth abortion] is ever medically necessary." He explained that "there are other methods that are available, safer, well-established methods." And he concluded that he had "grave concerns" that "elements of the [partial-birth abortion] procedure have risks for both immediate complications and long-term complications." J.A. 774-776.

Dr. Charles Lockwood, chairman of the department of obstetrics and gynecology at Yale University and a specialist in maternal-fetal medicine, testified that there is no evidence

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[3] Many of the same physicians testified in both cases—and some of the testimony in this case was actually incorporated into the record in *Carhart*. See, *e.g.*, 05-380 J.A. 510-563, 622-691, 823-869.

[4] The district court appears to have ignored Dr. Clark's testimony altogether. See Pet. App. 100a-101a.

that "the D&X offers advantages over medical terminations and D&Es." He added that he "cannot conceive of a circumstance where an intact D&X is the only option for terminating a pregnancy," because there are "very reasonable" alternative abortion methods. Notably, he so testified despite the fact that he supported abortion rights and personally opposed the Act. J.A. 990, 994, 1001, 1011, 1025-1026, 1039.

Dr. Elizabeth Shadigian, an associate professor of obstetrics and gynecology at the University of Michigan and ACOG fellow, testified that she had "never personally had to use a partial-birth abortion procedure to take care of women, even sick women with medical conditions." She stated that "there is no sound basis to say there is anything safe about the D&X procedure, especially when there are other procedures * * * that are safe and well-studied in the medical literature." J.A. 678-687, 707-710.

Finally, Dr. LeRoy Sprang, an ACOG fellow, testified that he had "never seen a situation where an intact D&X was necessary," and that, in emergency situations, a partial-birth abortion "would never be the only choice and never be the best choice." He added that partial-birth abortion "presents serious safety risk to the mother." J.A. 600-606, 653-654, 666-667.

c. To be sure, respondents did present some evidence at trial suggesting that partial-birth abortion may be marginally safer than other types of abortion in certain hypothetical circumstances (*e.g.*, where the mother has preeclampsia or placenta previa) or as a more categorical matter (*e.g.*, because a partial-birth abortion requires fewer instrument insertions in the uterus than a standard D&E abortion).[5] After reviewing

[5] As in *Carhart*, respondents relied heavily at trial on a peer-review study led by Dr. Stephen Chasen, a plaintiff in other litigation challenging the constitutionality of the Act. For the reasons stated in the government's brief in *Carhart* (at 37 n.12), however, that study does not support the proposition

the evidence presented at trial, moreover, the district court did find that "intact D&E is in fact the safest medical option for some women in some circumstances," though it failed to specify what those circumstances were (and also found that "plaintiffs have not demonstrated the existence of any particular situation * * * in which an intact D&E would be a doctor's *only* option to preserve the life or health of a woman"). Pet. App. 147a (emphasis added).

But any adverse trial evidence or findings by the district court, even if more clearly focused on the relevant legal question (*viz.*, the existence of significant health risks in a large fraction of the statute's applications), would not necessarily imply that Congress's factual findings are invalid. See, *e.g.*, *Turner II*, 520 U.S. at 210-211; *Rostker*, 453 U.S. at 82-83. Indeed, to the extent that the lower courts were correct in finding a lack of "consensus" concerning the medical necessity of partial-birth abortion, see Pet. App. 22a, 215a, the necessary implication is that, at a minimum, there is substantial evidence to support Congress's conclusion that partial-birth abortion is never medically indicated. A contrary standard would permit a single district court judge to override the considered judgment of Congress simply by finding that there is *some* room for disagreement on an issue of medical fact.

At various points in its opinion, the district court seemingly suggested that deference to Congress's factual findings was inappropriate because the government's witnesses at trial (and the witnesses who testified in favor of the Act before Congress) were not credible. As a preliminary matter, deference to congressional factfinding presumably entails, at a minimum, leaving judgments about the credibility of congressional witnesses to Congress, which actually heard those wit-

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that partial-birth abortion is ever medically necessary to preserve a mother's health. Indeed, the district court ultimately conceded that the study "cannot be considered conclusive on the issue." Pet. App. 143a.

nesses. Cf., *e.g.*, *Akins* v. *Texas*, 325 U.S. 398, 401 (1945) (noting that reviewing court owes deference to credibility determinations by "the trier of fact who heard the witnesses in full and observed their demeanor on the stand"). In any event, the district court identified no valid rationale for questioning the credibility of the witnesses who testified in favor of the Act, either at trial or before Congress.

The district court correctly noted that the physicians who testified that partial-birth abortion was never medically necessary did not carry out partial-birth abortions themselves. See, *e.g.*, Pet. App. 100a (noting that "none [of the government's expert witnesses] had performed the intact D&E procedure at issue in this case"); *id.* at 198a (further noting that, "[l]ike the government's witnesses in this case, none of the six physicians who testified before Congress had ever performed an intact D&E"). It is hardly surprising, however, that physicians who testified under oath that partial-birth abortion was never medically necessary would *not* carry out such abortions. Many of those physicians, moreover, were maternal-fetal experts who specialized in treating women with high-risk pregnancies (including women who had suffered complications from abortions)—and who were therefore perfectly capable of assessing the risks that would attend partial-birth abortions, as the district court to some extent acknowledged. See *id.* at 104a (finding that the government's witnesses were "eminently qualified as obgyn practitioners" and permitting their testimony "regarding their opinions on the safety of the procedure, based upon their review of the literature").

The district court also noted that many of the doctors who testified that partial-birth abortion was never medically necessary were opposed to abortion more generally. See, *e.g.*, Pet. App. 199a. That is not true of all of the government's witnesses. For example, Dr. Lockwood testified that he supported abortion rights (and personally opposed the Act). See

J.A. 1001, 1039. In any event, a physician's opposition to abortion more generally does not prevent him from objectively evaluating the comparative risks presented by different abortion *methods*. In addition, the record reflects that many of the witnesses who testified that partial-birth abortion was medically necessary themselves opposed the Act (and other abortion regulations). See, *e.g.*, Creinin Tr. 733 (testimony of respondents' witness, Dr. Mitchell Creinin, that he does "not think it is appropriate for Congress to legislate at all about the abortion procedure that physicians can and cannot perform pre-viability"). The district court nevertheless did not treat those witnesses' apparent support for abortion as undermining their credibility. Such disparate treatment was unjustified. Because there is no legitimate basis for questioning the evidence supporting Congress's findings on the medical necessity of partial-birth abortion, including its ultimate and most relevant finding that partial-birth abortion is never medically indicated to preserve the mother's health, those findings are valid and entitled to deference.

C. A Statute That Prohibits Partial-Birth Abortion Does Not Impose An Undue Burden On A Woman's Access To An Abortion, And *Stenberg* Should Be Overruled To The Extent That It Compels A Different Result

1. Finally, even if the Court refused to defer to Congress's considered findings, respondents' trial evidence at most suggested that partial-birth abortion is *marginally* safer than other safe abortion procedures in certain rare circumstances. Absent a showing that it would "create *significant* health risks," however, a statute prohibiting partial-birth abortion does not impose an undue burden on a woman's access to an abortion. *Stenberg*, 530 U.S. at 932 (emphasis added). A different understanding would all but remove the government's compelling interest in protecting potential hu-

man life from the equation in reviewing abortion regulations, and thus depart from one of the central teachings of *Casey*. See *Stenberg*, 530 U.S. at 967 (Kennedy, J., dissenting) (stating that, "[w]here the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method") (citing *Casey*, 505 U.S. at 880).

In adopting the undue-burden standard (and thereby relaxing the standard for reviewing abortion regulations that had emerged from the Court's post-*Roe* decisions), the joint opinion in *Casey* emphasized that the government has a "profound interest in potential life," 505 U.S. at 878, and that the Court's prior cases had undervalued that "profound interest" in analyzing the constitutionality of abortion statutes, see *id.* at 871. As the government's brief in *Carhart* explains (at 40-43), the Act implicates not only the government's compelling interest in protecting human life, but also the government's specific (and no less compelling) interest in prohibiting a particular type of abortion procedure that closely resembles infanticide. The gravity of those interests is beyond question. See *Stenberg*, 530 U.S. at 963 (Kennedy, J., dissenting) (noting that partial-birth abortion has been "subject to the most severe moral condemnation, condemnation reserved for the most repulsive human conduct"); *id.* at 979 (describing partial-birth abortion as "a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life"). In light of the relative strength of the government's interests in prohibiting partial-birth abortion, and the relative weakness of a woman's interest in having access to a particular type of abortion procedure that has no health advantages (according to Congress), or at most marginal health advantages, when compared with other, unregulated types of procedures, the Act is constitutional

under *Casey* because it does not impose an undue burden on a woman's access to an abortion.

If the joint opinion in *Casey* does not leave room for the government to proscribe a rarely used, grotesque, and inhumane late-term procedure such as partial-birth abortion, which at best could offer only marginal health benefits in a tiny category of hypothetical cases, it is difficult to see how the joint opinion accomplished its stated objective of elevating the government's "important and legitimate interest in potential life" in the equation, and thus establishing a more "appropriate means of reconciling the [government's] interest with the woman's constitutionally protected liberty." 505 U.S. at 871, 876 (citation omitted). Indeed, if such a procedure is unconstitutional under the *Casey* framework, it is difficult to see how any meaningful late-term abortion regulation could survive scrutiny.

2. As explained in the government's brief in *Carhart* (at 43), the Court's decision in *Stenberg* is distinguishable in a number of important respects from this case. Most notably, the statute at issue here is an Act of Congress accompanied by congressional findings that are amply supported by substantial evidence and therefore entitled to deference. In addition, the statute carefully defines partial-birth abortion so that it does not reach the more common D&E procedure. Moreover, because this case involves a federal statute, the federal courts have much greater latitude to interpret the statute to avoid any constitutional difficulties. And the trial record in this case is much more extensive than the trial record in *Stenberg*, where the trial lasted only one day (whereas the trial in this case lasted almost three weeks, and the trial in *Carhart* lasted two weeks).

If, however, the Court were to conclude for any reason that *Stenberg* compels the conclusion that the Act is unconstitutional, *Stenberg* should be overruled for the reasons given

in the government's brief in *Carhart* (at 43-44). Indeed, as discussed above, a reading of *Stenberg* that requires invalidation of the Act would put *Stenberg* into conflict with the earlier decisions on which it was purportedly based, including *Casey*. The better view, however, is that *Stenberg*, as properly understood, does not support the conclusion that the Act is facially invalid because it lacks a health exception.

II. THE ACT IS NEITHER UNCONSTITUTIONALLY OVERBROAD NOR UNCONSTITUTIONALLY VAGUE

The court of appeals in this case, unlike the court of appeals in *Carhart*, went on to hold that the Act was facially invalid because it was unconstitutionally overbroad, Pet. App. 23a-33a, and because it was unconstitutionally vague, *id.* at 33a-40a. Each of those additional holdings is erroneous.

A. The Act Is Not Unconstitutionally Overbroad

1. In *Stenberg*, this Court held that the Nebraska statute at issue was invalid not only because it lacked a health exception, but also because it defined "partial birth abortion" in such a way as to reach standard D&E abortions as well as D&X abortions, and thereby imposed an undue burden on a woman's access to an abortion. 530 U.S. at 938-946. That statute barred a physician from "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child." Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999). The Court explained that a standard D&E abortion "will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." 530 U.S. at 939. The Court thus reasoned that, "[e]ven if the statute's basic aim is to ban D&X, its language makes clear that it also covers a much broader category of procedures." *Ibid.* The Court further explained

that the Nebraska statute did not "anywhere suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus." *Ibid.* "The plain language of the statute," the Court concluded, "covers both procedures." *Ibid.*

2. The statute at issue here contains a definition of "partial-birth abortion" which differs in two critical respects from the statutory definition at issue in *Stenberg*. First, the Act applies only where the person performing the abortion "deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." Act § 3, 117 Stat. 1206-1207 (18 U.S.C. 1531(b)(1) (Supp. III 2003)). Unlike the Nebraska statute, the Act thus specifies so-called anatomical "landmarks" beyond which the fetus must be delivered in order to trigger the Act's application. Second, the Act applies only where the person performing the abortion also "performs [an] overt act, other than completion of delivery, that kills the partially delivered living fetus," and delivers the fetus with the purpose of performing that overt act. *Ibid.* Unlike the Nebraska statute, the Act thus requires the performance of a discrete "overt act," wholly apart from delivery of the specified portion of the fetus.

3. Despite those differences, the court of appeals concluded that the Act was unconstitutionally overbroad because it "covers non-intact as well as intact D&Es." Pet. App. 30a. That conclusion is incorrect. In a standard D&E abortion, the physician dismembers the fetus while the remainder of the fetus is still inside the womb—typically by grasping the nearest body part and then tearing it off. J.A. 144-147, 452. The

Act plainly excludes such abortions. Because the Act specifies anatomical "landmarks" beyond which the fetus must be delivered, the Act excludes any standard D&E abortion in which a smaller portion of the fetus, such as a foot or arm, is drawn through the cervix (or outside the mother's body altogether), and torn from the fetus, while the fetus is still living. Moreover, because the Act specifies that the physician must perform a discrete "overt act, other than the completion of delivery," the Act excludes any standard D&E abortion not already excluded by the anatomical "landmark" requirement, because, in a standard D&E abortion, the "delivery" of a portion of the fetus is incidental and integral to (and thus indistinguishable from) the performance of the lethal act (*i.e.*, the dismemberment of the fetus). When considered in conjunction, therefore, the various requirements of the Act operate to exclude standard D&E abortions.

Respondents did present some evidence at trial suggesting that physicians who intend to perform standard D&E abortions are occasionally able to remove the fetus either entirely or largely intact, typically because the mother's cervix is more fully dilated. See Pet. App. 66a-67a. The Act, however, applies only where the person performing the abortion has the specific intent, at the outset of the procedure, to deliver the requisite portion of the fetus for the purpose of performing the ultimate lethal act. See Act § 3, 117 Stat. 1206-1207 (18 U.S.C. 1531(b)(1) (Supp. III 2003)). Even assuming that it could be said that a physician in such a case intends at the outset to deliver the requisite portion of the fetus, but see Pet. App. 66a (noting that "[t]he potential for a largely intact removal cannot be ascertained until the surgical procedure has already begun"), it cannot be said that the physician specifically intends at the outset to deliver the requisite portion of the fetus *for the purpose of performing the ultimate lethal act*, as the Act requires. Thus, in the highly un-

usual situation in which a physician can show that he set out to perform a standard D&E abortion but ultimately had to perform a partial-birth abortion (for example, because the physician unintentionally delivered the requisite portion of the fetus), the Act would be inapplicable. Respondents therefore cannot identify any circumstance in which the Act would cover a physician intending to perform a standard D&E abortion.

Although the court of appeals concluded that the Act "covers non-intact as well as intact D&Es," Pet. App. 30a, the only alleged example of the former given by the court of appeals was an abortion in which a physician delivers the requisite portion of the fetus and only then performs a discrete act of dismemberment. See, *e.g.*, *id.* at 29a-30a, 31a-32a. As a preliminary matter, the court of appeals cited no authority except an amicus brief for the proposition that physicians ever intentionally perform abortions in this manner, and the record in this case (as well as the record before Congress) contains no evidence supporting that proposition. See *id.* at 31a-32a. Rather, the record suggests that physicians performing abortion generally either use the cervix to restrain the body of the fetus to enable dismemberment (in performing a standard D&E abortion) or deliver the fetus beyond a specified anatomical "landmark" for the purpose of subsequently killing the living fetus by crushing the fetal skull (in performing a D&X or intact D&E abortion). The record does not suggest that physicians partially deliver the fetus beyond a specified anatomical "landmark" for the purpose of subsequently killing the living fetus *by dismemberment*. In any event, such an abortion would merely constitute an especially gruesome form of the partial-birth abortion procedure that the Act seeks to outlaw. Because there is no sense in which a delivery-followed-by-dismemberment abortion can be classified as a standard D&E abortion, the very premise of the court of ap-

peals' overbreadth analysis—that the Act covers some non-intact D&E abortions—is simply incorrect.

4. The court of appeals in this case asserted that, "[w]hen drafting the Act * * *, Congress deliberately chose not to follow the Court's guidance" in *Stenberg* concerning "how to draft a statute that would adequately distinguish between the two forms of D&E." Pet. App. 24a, 25a. In *Stenberg*, however, the Court indicated that the critical question was whether the statute "track[s] the medical differences" between partial-birth abortion and other, more common types of abortion. 530 U.S. at 939. For the reasons discussed above, and contrary to the court of appeals' conclusion (see Pet. App. 25a), the Act does track the medical differences between partial-birth abortions and standard D&E abortions, by defining the prohibited procedure in a way that excludes the latter.[6]

The court of appeals' real complaint is that Congress failed to provide an *express exception* for standard D&E abortions. See, *e.g.*, Pet. App. 24a-25a.[7] In *Stenberg*, however, the Court made clear that including such an exception was only an "example" of how a legislature could draw a permissible statute regulating partial-birth abortion, not a categorical requirement. See 530 U.S. at 939. In light of the Act's detailed definition of the prohibited procedure, Congress could reasonably have concluded that an express exception for standard

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[6] Moreover, the Act's definitional approach has the advantage of prohibiting particular forms of abortion (such as the court of appeals' hypothetical delivery-followed-by-dismemberment abortion) that might not strictly qualify as "D&X abortions," but are clearly partial-birth abortions of the type that Congress sought to prohibit.

[7] The Act does effectively contain an express exception for *induction* abortions—*i.e.*, abortions that are accomplished through the "completion of delivery" of a living (but non-viable) fetus. See Act § 3, 117 Stat. 1207 (18 U.S.C. 1531(b)(1)(B) (Supp. III 2003)).

D&E abortions would have been superfluous.[8] Nor is it clear that even an express exception would address all the overbreadth concerns identified by the court of appeals. Such an exception, for example, would presumably not be sufficient to exclude abortions involving unintended partial delivery (absent a purpose requirement of the type contained in the Act), nor would it presumably be sufficient to exclude the hypothetical delivery-followed-by-dismemberment abortions cited by the court of appeals (which, for the reasons stated above, do not constitute standard D&E abortions at all). In the end, it is clear that the court of appeals effectively held Congress to impossible standards of draftsmanship. Because *Stenberg* required a legislature seeking to regulate partial-birth abortion only to define the prohibited procedure with sufficient particularity to exclude other, more common types of abortion, and because the Act readily meets that requirement, the Act is not unconstitutionally overbroad.

5. Finally, to the extent that there is any doubt as to whether the Act reaches standard D&E abortions as well as D&X abortions, the Court should interpret the Act to exempt all standard D&E abortions and thus to avoid any constitutional difficulties. Indeed, because this case involves a federal statute, the Court has a much greater capacity to interpret the statute to avoid constitutional difficulties than it did in

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[8] Both the majority opinion and Justice O'Connor's concurring opinion in *Stenberg* favorably cited a Kansas statute that contains an express exception. See 530 U.S. at 939; *id.* at 950 (O'Connor, J., concurring). That statute excludes, *inter alia*, "the * * * dilation and evacuation abortion procedure involving dismemberment of the fetus *prior to removal* from the body of the pregnant woman." Kan. Stat. Ann. § 65-6721(b)(2) (West Supp. 1998) (emphasis added). For the reasons explained above, however, the federal Act already defines the prohibited procedure in such a way as to exclude abortions that would fall within that statutory exception (and that statutory exception clearly would not exclude the court of appeals' hypothetical delivery-followed-by-dismemberment abortion).

Stenberg. See, *e.g.*, *Webb* v. *Webb*, 451 U.S. 493, 500 (1981); *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369-370 (1971); cf. *Stenberg*, 530 U.S. at 944-945. If this Court were to conclude that there is any constitutional infirmity with regard to the breadth of the Act, the solution would be to interpret the Act to avoid such infirmity and not, as the court of appeals seemingly did, to construe the statute to exacerbate any infirmity and then invalidate the Act in its entirety.

B. The Act Is Not Unconstitutionally Vague

1. In order to survive a vagueness challenge, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The Constitution, however, does not impose "impossible standards of clarity," *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983) (internal quotation marks and citation omitted), nor does it require "mathematical certainty" from statutory language, *Grayned*, 408 U.S. at 110. Instead, a statute is not vague if it is "clear what the [statute] as a whole prohibits." *Ibid*. Moreover, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000) (internal quotation marks and citation omitted). Finally, in the context of a federal statute, federal courts have broad authority to construe the statute to provide clarity and to avoid unconstitutional vagueness. See, *e.g.*, *Dennis* v. *United States*, 341 U.S. 494, 501-502 (1951).

2. The court of appeals held both that the operative provisions of the Act more generally were unconstitutionally vague, see Pet. App. 34a-35a, 37a, and that specific phrases within the Act were also unconstitutionally vague, see *id*. at

38a-39a. Because the Act readily satisfies the relatively modest requirements of the void-for-vagueness doctrine, each of those holdings is erroneous.

a. The court of appeals suggested that the Act's operational provisions were vague "when read as a whole" because the Act "could readily be applied to a range of methods of performing post-first trimester abortions." Pet. App. 37a, 40a. As a preliminary matter, the court of appeals' conclusion that the Act was vague because it *might* cover standard D&E abortions is in some tension with its earlier conclusion that the Act was overbroad because it *does* cover standard D&E abortions—as the court of appeals itself recognized. See, *e.g.*, *id.* at 34a. Indeed, the only way to reconcile those two observations is to conclude that the court of appeals flouted its normal obligation to construe terms it deems vague in such a way as to avoid, rather than exacerbate, any constitutional difficulty. See *Thornburgh* v. *American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 829 (1986) (O'Connor, J., dissenting) (criticizing majority for "invent[ing] an unprecedented canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs") (internal quotation marks and citation omitted).

In any event, the Act's operational provisions are neither vague nor overbroad, because the Act unambiguously excludes standard D&E abortions (and, *a fortiori*, could reasonably be so construed), and otherwise precisely defines the conduct that it prohibits. See pp. 30-36, *supra*. As discussed above, the Act prohibits only a particular type of abortion in which the physician "deliberately and intentionally vaginally delivers a living fetus" up to a specific anatomical point "outside the body of the mother"; does so "for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus"; and then "performs the overt act, other than completion of delivery, that kills the partially

delivered living fetus." Act § 3, 117 Stat. 1206-1207 (18 U.S.C. 1531(b)(1) (Supp. III 2003)). In addition, the physician must "knowingly" perform that type of abortion. § 3, 117 Stat. 1206 (18 U.S.C. 1531(a) (Supp. III 2003)). Neither the court of appeals nor respondents suggest how Congress could have defined the proscribed conduct any more precisely—and it is hard to imagine how it would be possible to do so, at least while still reaching the full range of conduct that Congress legitimately aimed to prohibit.

b. The court of appeals also suggested that the specific phrases "overt act" and "living fetus" were vague. See Pet. App. 38a-39a.[9] With regard to the phrase "overt act," the court of appeals reasoned that the phrase, even as limited by the phrase "other than completion of delivery," could "plausibly encompass a range of acts involved in non-intact D&E" and therefore "does nothing to remedy the statute's failure to provide adequate notice of what forms of D&E the Act prohibits." *Id.* at 38a. But, as is true with any statutory phrase, the phrase "overt act" must be read in context. See, *e.g.*, *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004); *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596 (2004); *Jones* v. *United States*, 527 U.S. 373, 389 (1999). And when read in context, the phrase "overt act" obviously refers to an act that is distinct from the act of partial delivery (thereby excluding standard D&E abortions, in which the act of "delivery" is incidental and integral to the act of dismemberment). Any breadth in that phrase is necessary to prevent a physician from evading the prohibition on partial-birth abortions simply by performing an atypical lethal act. Moreover, it does not follow from the fact that the phrase "overt act" is in some respects *broad* that the

[9] For its part, the district court appears to have concluded that the phrase "partial-birth abortion" was also vague. See Pet. App. 92a-93a. That phrase, however, is expressly defined in the Act, and, for the reasons discussed in text, none of the terms or phrases used *within* that definition is ambiguous.

phrase is also *vague*. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209-212 (1998). To the contrary, as the district court in *Carhart* noted, the phrase "overt act" is a "standard statutory term[] of art," 05-380 Pet. App. 529a, which appears in numerous other criminal statutes. See, *e.g.*, 18 U.S.C. 1117, 1201(c), 2101(a).

As for the phrase "living fetus," the court of appeals reasoned that "the use of the term 'living fetus' instead of 'viable fetus' creates additional confusion about the Act's scope." Pet. App. 39a. The natural inference, however, is that Congress deliberately chose to use the phrase "living fetus," rather than "viable fetus," precisely because it wanted to reach abortions that occurred late in the term but prior to viability. And, as the court of appeals acknowledged (before inexplicably reaching a contradictory conclusion), the phrase "living fetus" does in fact have a specific meaning: *i.e.*, a fetus that "has a detectable heartbeat or pulsating umbilical cord." *Ibid.*; see 05-380 Pet. App. 529a (concluding that the term "living" is a "commonplace word" of which "doctors have a practical understanding"). Like the phrase "overt act," therefore, the phrase "living fetus" may be broad in some respects, but it is not vague. In sum, because the Act contains no ambiguous terms and phrases, and because the Act as a whole plainly provides sufficient notice of the conduct it prohibits, the court of appeals erred by holding the Act void for vagueness.

3. Finally, to the extent that the Court were to conclude that the Act is unconstitutionally vague in any respect, it could readily give that federal statute a narrowing construction—just as it could if it were to conclude that the Act is unconstitutionally overbroad. See pp. 35-36, *supra*. In that respect, this case fundamentally differs from *Stenberg*, in which this Court was less free to give the statute at issue a narrowing construction to avoid any constitutional infirmity because

of the Court's more limited capacity so to construe state statutes.

III. THE COURT OF APPEALS' REMEDIAL ANALYSIS IS FUNDAMENTALLY FLAWED

The court of appeals held that the Act should be enjoined in its entirety. Pet. App. 40a-54a. Of course, if this Court concludes that the court of appeals erred on the merits, it would not need to reach the question of the appropriate remedy. If, however, this Court were to identify some respect in which the Act is invalid, it would be possible, and thus presumptively appropriate, to craft narrower injunctive relief along the lines suggested in *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), depending on the exact nature of the Act's infirmity. Because the Act is in fact facially valid, further development of the remedial question identified in *Ayotte* will have to await another case. At a minimum, however, it is clear that the court of appeals' approach to the remedial question was fundamentally flawed.

A. In *Ayotte*, the Court considered a facial challenge to the constitutionality of a New Hampshire parental-notification statute that did not contain an express statutory exception for cases in which a medical emergency required an immediate abortion. 126 S. Ct. at 964-965. New Hampshire conceded the possibility of applications of the statute in emergency situations which could create significant health risks and that "it would be unconstitutional to apply [the statute] in a manner that subjects minors" to such risks. *Id.* at 967.

In light of that concession, the Court "turn[ed] to the question of remedy." *Ayotte*, 126 S. Ct. at 967. The Court reasoned that "[t]hree interrelated principles inform our approach to remedies." *Ibid.* First, the Court stated that "we try not to nullify more of a legislature's work than is necessary"; thus, the Court noted, the "normal rule" is that "par-

tial, rather than facial, invalidation is the required course." *Id.* at 967-968 (citation omitted). Second, the Court explained that, "mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewrit[ing] state law to conform it to constitutional requirements even as we try to salvage it." *Id.* at 968 (internal quotation marks and citation omitted). Third, the Court suggested that "the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ibid.* (internal quotation marks and citation omitted).[10] Under that principle, the Court added, the relevant inquiry, "[a]fter finding an application or portion of a statute unconstitutional," is whether "the legislature [would] have preferred what is left of its statute to no statute at all." *Ibid.* The Court thus vacated the court of appeals' decision invalidating the statute in its entirety and remanded for a determination as to whether a narrower injunction, prohibiting only the statute's "few" unconstitutional applications, could be crafted consistent with legislative intent. *Id.* at 969.

B. 1. The court of appeals in this case initially suggested that, if the Act were facially invalid solely because it lacked a health exception, the court "might have been able to draft a more 'finely drawn' injunction" under *Ayotte*. Pet. App. 41a (citation omitted). The court ultimately concluded, however, that a narrower injunction would not be appropriate even in that instance, because such an injunction would be inconsistent with Congress's intent in promulgating the Act. *Ibid.*

That conclusion is erroneous. In reaching that conclusion, the court of appeals heavily relied on the fact that "Congress did not inadvertently omit a health exception from the Act."

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[10] Obviously, to the extent that federalism concerns inform those limits on judicial competence, such concerns are inapplicable in the context of a federal statute.

Pet. App. 42a. It is certainly true that Congress considered, and ultimately rejected, various proposals to include an express health exception in the Act. In doing so, various members expressed concern that a statutory health exception would be abused by physicians who would claim that an elective partial-birth abortion was nevertheless necessary to preserve the mother's health. See, *e.g.*, H.R. Rep. No. 58, 108th Cong., 1st Sess. 69 (2003) (statement of Rep. Chabot) (stating that "a health exception, no matter how narrowly drafted, gives the abortionist unfettered discretion in determining when a partial-birth abortion may be performed"); 149 Cong. Rec. H4940 (daily ed. June 4, 2003) (statement of Rep. Sensenbrenner) (contending that "[a]bortionists have demonstrated that they can and will justify any abortion on the grounds that it, in the judgment of the attending physician, is necessary to avert serious adverse health consequences to the woman"); 149 Cong. Rec. S3607 (daily ed. Mar. 12, 2003) (statement of Sen. Santorum) (asserting that, "[i]n practice, of course, health means anything, so there is no restriction at all"); 143 Cong. Rec. 8355 (1997) (statement of Sen. Hutchinson) (noting that health exception "would allow any abortionist to kill a baby even after viability merely by signing a permission slip to himself, a so-called certification").[11]

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[11] Evidence before Congress demonstrated that Congress's concern was a very real one. For example, in Kansas—described by one legislator as "the partial-birth abortion capital of the nation," see Scott Rothschild, *Abortions on the Rise, State Reports*, Wichita Eagle, Mar. 25, 2000, at 1A—the State Department of Health reported that 182 partial-birth abortions were conducted in 1999. In every one of those 182 abortions, the physician certified that the abortion was necessary to prevent a "mental," rather than "physical," impairment of the mother. See 05-380 Pet. App. 108a-109a; cf. *Stenberg*, 530 U.S. at 972 (Kennedy, J., dissenting) ("A ban which depends on the 'appropriate medical judgment' of Dr. Carhart is no ban at all. * * * This, of course, is the vice of a health exception resting in the physician's discretion.").

It does not necessarily follow from the fact that Congress purposefullly adopted a statute *without* a health exception rather than a statute *with* a health exception, however, that Congress would have preferred *no statute at all* to a statute with a (judicially crafted) health exception—the relevant inquiry under *Ayotte*. See 126 S. Ct. at 968. Congress specifically found that partial-birth abortion was a "gruesome," "brutal," and "inhumane" procedure, Act §§ 2(1), 2(14)(L), 2(14)(N), 117 Stat. 1201, 1206, which raised serious ethical and medical concerns, *e.g.*,§§ 2(1), 2(14)(A), 2(14)(J), 117 Stat. 1201, 1204, 1205. Those findings, and the statements of various members, suggest that the proponents of the Act would have preferred to prohibit partial-birth abortions in at least some circumstances, even if they could not have prohibited them altogether. See, *e.g.*, *Partial-Birth Abortion—The Truth: Joint Hearing Before the Senate Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 97 (1997) (statement of Sen. Ashcroft) (asserting that, "if there were one young child that was subjected to this procedure needlessly, I think it would be incumbent upon all of us * * * to cry out against it").[12]

The court of appeals hypothesized that, "[p]articularly when an issue involving moral or religious values is at stake, it is far from true that the legislative body would always prefer some of a statute to none at all," on the ground that "the leaders of the battle * * * may conclude that leaving an

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[12] Moreover, to the extent that the absence of a health exception would impose an undue burden only in specific circumstances (*e.g.*, where the mother suffers from a particular health-threatening condition or conditions), the partial invalidation of the statute (*e.g.*, as applied to women with specific conditions) would leave much of the statute intact and thus would not lead to the circumvention concerns that apparently motivated proponents of the Act to omit a health exception in the first place.

issue completely unaddressed will make it easier for them to achieve their ultimate goals than would a partial resolution that leaves their 'base' discontented and disillusioned." Pet. App. 46a. Based on that hypothesis, the court concluded that "[w]hether the congressional partisans who supported the Act would have preferred" some statute to no statute at all "is a determination we are simply unable and unwilling to make." *Id.* at 47a. But the fact that the *Ayotte* analysis is counterfactual (and thus difficult) is not an excuse for failing to undertake that analysis, let alone for adopting a rule that, where the intent of Congress is not obvious, a court should err on the side of facial invalidation. After all, the Court reiterated in *Ayotte* that partial, rather than facial, invalidation was the "normal rule." 126 S. Ct. at 968 (citation omitted). Accordingly, if the court of appeals were "unable" to find that Congress would have preferred *no* statute to a modified statute, it should have opted for partial invalidation instead.

In the end, any difficulty that the court of appeals faced in crafting a narrower injunction in this case may have stemmed from its erroneous analysis of the merits. On the merits, the court of appeals concluded that "a substantial disagreement exists in the medical community regarding whether [the] procedures [banned by the Act] are necessary in certain circumstances." Pet. App. 22a, but failed to identify the specific "circumstances" to which it was referring (*i.e.*, the particular health-threatening condition or conditions that it believed would necessitate a partial-birth abortion).[13] The court of appeals' difficulty in fashioning a narrower remedy can thus be traced to the deficiencies in plaintiffs' evidence and the court's resulting inability to elaborate on the basis for its holding that

[13] The court of appeals' inability to do so is not surprising, since the district court specifically found that "plaintiffs have not demonstrated the existence of any particular situation * * * in which an intact D&E would be a doctor's only option to preserve the life or health of a woman." Pet. App. 147a.

the Act was facially invalid in the first place. If this Court were to conclude that any such circumstances existed (despite Congress's findings to the contrary), it could readily enjoin the Act's application in those specific circumstances while leaving the remainder of the Act intact.

2. The court of appeals in this case concluded that, if the Act were also facially invalid because it was unconstitutionally overbroad and vague, it would be inappropriate to craft narrower injunctive relief. Pet. App. 47a-54a. That conclusion is doubly mistaken. To begin with, any potential overbreadth or vagueness concerns with a federal statute could and should be addressed in the first instance by adopting a narrowing construction of the statute. In any event, if the Court ultimately concluded that the Act could only be construed such that it either *does* cover some standard D&E abortions (and thus is unconstitutionally overbroad) or *might* cover some standard D&E abortions (and thus is unconstitutionally vague), a narrower injunction could easily be crafted to prevent the Act from being applied to those abortions while permitting it to be applied to partial-birth abortions.

The court of appeals identified two primary reasons for concluding that narrower injunctive relief would be inappropriate. First, the court of appeals stated that crafting narrower injunctive relief "would require us to make decisions that are the prerogative of elected officials" and, "akin to writing legislation, adopt new terms with new definitions and new language creating limitations on the Act's scope." Pet. App. 47a. But concerns about usurping a legislative function do not provide an excuse for declining to engage in the *Ayotte* analysis or applying the "normal rule" favoring partial invalidation. Nor is this a case in which a court would need to make any legislative or policy judgments in crafting narrower injunctive relief. It is clear from Congress's findings, and from statements of proponents and opponents alike in the legisla-

tive record, that Congress's purpose in passing the Act was to prohibit partial-birth abortions, not standard D&E abortions (or any other abortions). See, *e.g.*, Act §§ 2(1), 2(2), 2(14)(A)-(O), 117 Stat. 1201, 1204-1206; *Partial-Birth Abortion Ban Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 1 (1995) (statement of Sen. Hatch); *id.* at 14 (statement of Sen. Kennedy); *Partial-Birth Abortion Ban Act of 2002: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong., 2d Sess. 2 (2002) (statement of Rep. Chabot). Any overbreadth or vagueness resulting from the fact that the Act either clearly or arguably prohibits other types of abortion could thus be cured, consistent with legislative intent, simply by clarifying that the Act does not reach standard D&E abortions (and thereby limiting the Act's reach to partial-birth abortions).[14]

Second, the court of appeals asserted that "the magnitude of the change in the Act's coverage that would be necessary * * * would result in a statute that would be fundamentally different from the one enacted." Pet. App. 47a. There is no basis, however, for the court of appeals' suggestion that a narrower injunction "would leave us with an Act of a drastically more limited scope" that "would outlaw only a very small portion of the procedures prohibited under the existing Act."

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[14] Remarkably, the court of appeals suggested that it would be inappropriate to craft an injunction that limited the Act to partial-birth abortions because it was uncertain whether even a statute that prohibited only partial-birth abortion would be constitutionally valid. Pet. App. 49a; see *id.* at 26a n.18, 47a. It is clear, however, that at least a majority of the Court (if not the entire Court) in *Stenberg* believed, at a minimum, that "a ban on partial birth abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional." 530 U.S. at 951 (O'Connor, J., concurring); see *id.* at 979 (Kennedy, J., joined by Rehnquist, C.J., dissenting); *id.* at 1020 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting).

Id. at 50a, 51a. While that might be true if the Act reached not only partial-birth abortions, but also *all* standard D&E abortions (which are much more common), the court of appeals did not explain how the Act could be so read. In fact, the only alleged example of a standard D&E abortion given by the court of appeals was an abortion in which a physician delivers the requisite portion of the fetus and only then performs a discrete act of dismemberment. Such an abortion is not properly classified as a standard D&E abortion at all, see pp. 33-34, *supra*, nor is there any evidence that physicians ever intentionally perform abortions in that manner. Accordingly, even if there were any difficulty with the statute reaching such hypothetical abortions, the resulting overbreadth or vagueness in the Act would affect at most a small fraction of its applications, if any, and narrower injunctive relief would not result in a "drastically limited" or "fundamentally different" statute.

C. In any event, as in *Carhart*, there is no need for the Court to reach any remedial issue in this case. Here, Congress has proscribed a single, rarely used late-term abortion procedure that it found to be both medically unnecessary and inhumane. Upholding the Act merely requires the Court to reaffirm the government's critical interests in regulating abortion procedures to protect human life and to prohibit procedures that blur the line between abortion and infanticide.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2006

APPENDIX

UNITED STATES PUBLIC LAWS
108th Congress - First Session
Convening January 7, 2003

PL 108-105 (S 3)
Nov. 5, 2003

PARTIAL-BIRTH ABORTION BAN ACT OF 2003

An Act To prohibit the procedure commonly known as partial-birth abortion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the "Partial-Birth Abortion Ban Act of 2003".

SEC. 2. FINDINGS.

The Congress finds and declares the following:

(1) A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion—an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the baby's brains) that the person knows will kill the partially delivered infant, performs this act, and then completes delivery of the dead infant—is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

(2) Rather than being an abortion procedure that is embraced by the medical community, particularly among physicians who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives. As a result, at least 27 States banned the procedure as did the United States Congress which voted to ban the procedure during the 104th, 105th, and 106th Congresses.

(3) In Stenberg v. Carhart, 530 U.S. 914, 932 (2000), the United States Supreme Court opined "that significant medical authority supports the proposition that in some circumstances, [partial birth abortion] would be the safest procedure" for pregnant women who wish to undergo an abortion. Thus, the Court struck down the State of Nebraska's ban on partial-birth abortion procedures, concluding that it placed an "undue burden" on women seeking abortions because it failed to include an exception for partial-birth abortions deemed necessary to preserve the "health" of the mother.

(4) In reaching this conclusion, the Court deferred to the Federal district court's factual findings that the partial-birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures.

(5) However, substantial evidence presented at the Stenberg trial and overwhelming evidence presented and compiled at extensive congressional hearings, much of which was compiled after the district court hearing in Stenberg, and thus not included in the Stenberg trial record, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health

risks to a woman upon whom the procedure is performed and is outside the standard of medical care.

(6) Despite the dearth of evidence in the Stenberg trial court record supporting the district court's findings, the United States Court of Appeals for the Eighth Circuit and the Supreme Court refused to set aside the district court's factual findings because, under the applicable standard of appellate review, they were not "clearly erroneous". A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985). Under this standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently". Id. at 574.

(7) Thus, in Stenberg, the United States Supreme Court was required to accept the very questionable findings issued by the district court judge—the effect of which was to render null and void [illegible] reasoned factual findings and policy determinations of the United States Congress and at least 27 State legislatures.

(8) However, under well-settled Supreme Court jurisprudence, the United States Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in Stenberg under the "clearly erroneous" standard. Rather, the United States Congress is entitled to reach its own factual findings—findings that the Supreme Court accords great deference—and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the

Constitution, and draws reasonable inferences based upon substantial evidence.

(9) In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Supreme Court articulated its highly deferential review of congressional factual findings when it addressed the constitutionality of section 4(e) of the Voting Rights Act of 1965. Regarding Congress' factual determination that section 4(e) would assist the Puerto Rican community in "gaining nondiscriminatory treatment in public services," the Court stated that "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations * * *. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support section 4(e) in the application in question in this case.". Id. at 653.

(10) Katzenbach's highly deferential review of Congress' factual conclusions was relied upon by the United States District Court for the District of Columbia when it upheld the "bail-out" provisions of the Voting Rights Act of 1965 (42 U.S.C. 1973c), stating that "congressional fact finding, to which we are inclined to pay great deference, strengthens the inference that, in those jurisdictions covered by the Act, state actions discriminatory in effect are discriminatory in purpose". City of Rome, Georgia v. U.S., 472 F. Supp. 221 (D.D.C. 1979) aff'd City of Rome, Georgia v. U.S., 446 U.S. 156 (1980).

(11) The Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. See Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622 (1994) (Turner I)

and Turner Broadcasting System, Inc. v. Federal Communications Commission, 520 U.S. 180 (1997) (Turner II). At issue in the Turner cases was Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be "seriously jeopardized". The Turner I Court recognized that as an institution, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here", 512 U.S. at 665-66. Although the Court recognized that "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law,'" its "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.". Id. at 666.

(12) Three years later in Turner II, the Court upheld the "must-carry" provisions based upon Congress' findings, stating the Court's "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" 520 U.S. at 195. Citing its ruling in Turner I, the Court reiterated that "[w]e owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions," id. at 195, and added that it "owe[d] Congress" findings an additional measure of deference out of respect for its authority to exercise the legislative power.". Id. at 196.

(13) There exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-

birth abortion is not required to contain a "health" exception, because the facts indicate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care. Congress was informed by extensive hearings held during the 104th, 105th, 107th, and 108th Congresses and passed a ban on partial-birth abortion in the 104th, 105th, and 106th Congresses. These findings reflect the very informed judgment of the Congress that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care, and should, therefore, be banned.

(14) Pursuant to the testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, Congress finds and declares that:

(A) Partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: An increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, "there are very few, if any, indications for * * * other than for delivery of a second twin"; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death.

(B) There is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. No controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Furthermore, there have been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Indeed, unlike other more commonly used abortion procedures, there are currently no medical schools that provide instruction on abortions that include the instruction in partial-birth abortions in their curriculum.

(C) A prominent medical association has concluded that partial-birth abortion is "not an accepted medical practice", that it has "never been subject to even a minimal amount of the normal medical practice development," that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "there is no consensus among obstetricians about its use". The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and the public, is "ethically wrong," and "is never the only appropriate procedure".

(D) Neither the plaintiff in Stenberg v. Carhart, nor the experts who testified on his behalf, have identified a single circumstance during which a partial-birth abortion was necessary to preserve the health of a woman.

(E) The physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

(F) A ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy.

(G) In light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions. In addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

(H) Based upon Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. This distinction was recognized in Roe when the Court noted, without comment, that the Texas parturition statute, which prohibited one from killing a child "in a state of being born and before actual birth," was not under attack. This interest becomes compelling as the child emerges from the maternal body. A child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person". Thus, the government has a heightened interest in protecting the life of the partially-born child.

(I) This, too, has not gone unnoticed in the medical community, where a prominent medical association has recognized that partial-birth abortions are "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb". According to this medical association, the "partial birth" gives the fetus an autonomy

which separates it from the right of the woman to choose treatments for her own body".

(J) Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. Partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children—obstetricians who preserve and protect the life of the mother and the child—and instead uses those techniques to end the life of the partially-born child.

(K) Thus, by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

(L) The gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

(M) The vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. It is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Thus, during a partial-birth abortion procedure, the child will fully experience the pain associated

with piercing his or her skull and sucking out his or her brain.

(N) Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus, Congress has a compelling interest in acting—indeed it must act—to prohibit this inhumane procedure.

(O) For these reasons, Congress finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

SEC. 3. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.

(a) IN GENERAL.—Title 18, United States Code, is amended by inserting after chapter 73 the following:

"CHAPTER 74—PARTIAL-BIRTH ABORTIONS

"Sec.

"1531. Partial-birth abortions prohibited.

"§ 1531. Partial-birth abortions prohibited

"(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is

endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

"(b) As used in this section—

"(1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion—

"(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

"(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

"(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: Provided, however, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

"(c)(1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

"(2) Such relief shall include—

"(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and

"(B) statutory damages equal to three times the cost of the partial-birth abortion.

"(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

"(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

"(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.".

(b) CLERICAL AMENDMENT.—The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 73 the following new item:

"74. Partial-birth abortions.....1531".

Approved November 5, 2003.